No. 80-317

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE UNIVERSITY OF TEXAS, *et al.*,
Petitioners,

v.

WALTER CAMENISCH,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Walter Camenisch, Respondent, respectfully prays that this Court deny Petitioners' Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on April 28, 1980.

STATEMENT OF THE CASE

Petitioners seek review of a preliminary injunction order in a case brought by a deaf man, Walter Camenisch, against the University of Texas. Mr. Camenisch challenged the University's refusal to provide an interpreter for his classes. He based his claim on both Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and 42 U.S.C. § 1983.

At the time he filed the suit, Mr. Camenisch was a graduate student at the University of Texas at Austin and was employed as Acting Dean of Students at the Texas School for the Deaf. Because his job was contingent upon supplementing his education, Mr. Camenisch enrolled in the University's Master's Degree program in education. Petitioners agreed that he needed the assistance of a qualified sign language interpreter in order to participate in and benefit from this academic program.

Faced with the prospect of losing his job if he could not pass these courses, Mr. Camenisch sought preliminary relief. The University moved to dismiss on the jurisdictional ground that there is no private right of action under Section 504. This argument was rejected by the District Court, which issued a preliminary injunction, ordering the University to provide an interpreter. As a condition to preliminary relief, the District Court ordered Mr. Camenisch to post a $3,000 security bond and to file an administrative complaint with the Department of Health, Education, and Welfare (HEW).

The Fifth Circuit Court of Appeals upheld the preliminary injunction order, finding no abuse of discretion by the District Court. The Court of Appeals also vacated that part of the order requiring the filing of an administrative complaint and sent the case back to the District Court for a final determination of Mr. Camenisch's claim. Motion for rehearing en banc was denied.

I. PETITION FOR CERTIORARI SHOULD NOT BE GRANTED TO REVIEW A PRELIMINARY INJUNCTION ORDER

There has been no final decision on the merits of Walter Camenisch's claim that the University should provide an interpreter for his classes. The District Court only ordered preliminary relief "to preserve any

rights [Plaintiff] *may have* under the statute and [to prevent] immediate and irreparable harm." Petition for Writ of Certiorari, p. A-21 (emphasis added). Since the District Court's order was not final, the petition for writ of certiorari should be denied. As this Court stated in *Hamilton Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916), lack of finality "of itself alone furnished sufficient ground for the denial."

Petitioners, in fact, conceded in their Brief to the Fifth Circuit that the issue of whether the University should provide interpreter services was not "presently before the Court in view of the fact that there has been no determination made by the Court below that such services are mandated by the regulations." *See* Appendix attached hereto. Petitioners only addressed the private right of action issue in their Brief to the Fifth Circuit.

Thus, as Petitioners recognized, the District Court should be given the opportunity to decide the merits of the case. In the interest of judicial economy, "the Supreme Court will not usually grant certiorari to review a non-final judgment such as . . . one sanctioning the issuance or denial of a preliminary injunction, in the absence of exceptional circumstances." R. Stern and E. Gressman, *Supreme Court Practice*, § 4.19 at 300 (5th ed. 1978). *See, e.g., Roe* v. *Doe*, 420 U.S. 307 (1975). There are no "exceptional circumstances" warranting review at this stage, since Petitioners were fully protected by the $3,000 security bond posted by Mr. Camenisch pending the final outcome of the litigation. As the order appealed from is not final, "it is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967).

II. THE FIFTH CIRCUIT CORRECTLY FOUND THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ISSUING THE PRELIMINARY INJUNCTION

The Fifth Circuit's holding was fully supported by the record and judicial precedent.* Judge Tuttle began by stating that, "appellate review of such orders is limited to an examination of whether the District Court abused its discretion." 616 F.2d at 130. In light of this restricted standard of review, the Fifth Circuit's holding that the District Court exercised sound discretion is not of sufficient importance to warrant the granting of certiorari. Rule 17 of Rules of the Supreme Court of the United States. *See, e.g., Bayless* v. *Martine*, 430 F.2d 873 (5th Cir. 1970), *cert. denied*, 406 U.S. 930 (1972).

Respondent notes that Petitioners have erroneously attempted to characterize the instant case as inconsistent with this Court's decision in *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979). The Fifth Circuit properly noted the obvious differences between *Southeastern Community College* and the present case. In the former case, this Court held that Mrs. Davis failed to meet the legitimate and necessary physical requirements of the college's nursing program, and hence was not an "otherwise qualified handicapped individual" within the meaning of Section 504. 442 U.S. at 407. This Court further found that none of the modifications and auxiliary aids authorized by the HEW Regulations could accommodate Mrs. Davis's handicap to enable her to participate

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* Three other federal district courts, faced with virtually identical situations, also issued preliminary injunctions to prevent irreparable harm to deaf college students. See, Barnes v. Converse College, 436 F. Supp. 635 (D. S.C. 1977); Crawford v. University of North Carolina, 440 F. Supp. 1047 (M.D. N.C. 1977); Herbold v. The Trustees of the California State Universities and Colleges, C-78-1358-RHS (N.D. Ca. July 17, 1978).

in the program and become a registered nurse. 442 U.S. at 409.

By stark contrast, Petitioners stipulated that Walter Camenisch was an otherwise qualified handicapped student who could participate successfully in his classroom activities with an interpreter. The Court of Appeals recognized that, unlike Mrs. Davis, Mr. Camenisch could realize the principal benefits of this academic program and perform well in his profession as Dean of Students at the Texas School for the Deaf, in spite of his handicap.

Petitioners dispute Judge Tuttle's conclusion that *Southeastern Community College* "was clearly not intended to bar relief for all handicapped people in the future." 616 F.2d at 132. However, that conclusion was based squarely on this Court's recognition that "situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory." *Southeastern Community College*, 442 U.S. at 412-413.

Moreover, Judge Tuttle's citation to the HEW Regulation requiring the provision of interpreters was founded upon this Court's statement in *Southeastern Community College* that "identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW." 442 U.S. at 413.

Thus, the significant factual distinctions between the two cases as well as the language of *Southeastern Community College* firmly support the Fifth Circuit's limited holding that Walter Camenisch's claim has a "probability" of success on the merits. Final determination of the merits of his claim should await a full trial.

III. THERE IS NO CONFLICT IN THE CIRCUITS ON THE PRIVATE RIGHT OF ACTION ISSUE

The Fifth Circuit held that Mr. Camenisch can maintain a private right of action under Section 504. As there is no conflict in the circuits on this issue, the petition for writ of certiorari should be denied.

The Fifth Circuit's holding is consistent with the decisions of every other court of appeals that has confronted the issue. *Lloyd* v. *Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977); *United Handicapped Federation* v. *Andre*, 558 F.2d 413 (8th Cir. 1977); *Kampmeier* v. *Nyquist*, 553 F.2d 296 (2d Cir. 1977); *NAACP* v. *Medical Ctr., Inc.*, 599 F.2d 1247 (3d Cir. 1979); *Davis* v. *Southeastern Comm. College*, 574 F.2d 1158 (4th Cir. 1978), *rev'd on other grounds*, 442 U.S. 397 (1979).

Moreover, in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), this Court found a private right of action under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* Because Section 504 was patterned after and is almost identical to Title IX, several courts have applied the same reasoning used in *Cannon* to Section 504. *See, e.g.*, *NAACP* v. *Medical Ctr., Inc.*, 599 F.2d at 1249, 1255-1258; *Rogers* v. *Frito-Lay, Inc., and Moon* v. *Roadway Express*, 611 F.2d 1074 (5th Cir. 1980), *cert. filed*, Nos. 79-1809 & 1810 (May 14, 1980); *Hart* v. *County of Alameda*, 485 F. Supp. 66 (N.D. Ca. 1979); *Larry P.* v. *Riles*, 3 EHLR 551: 295 (N.D. Ca. 1979); *Medley* v. *Ginsberg*, No. 78-2099-CH (S.D. W. Va. June 10, 1980).

Petitioners contend that the Fifth Circuit's finding of no private right of action under Section 503 of the Rehabilitation Act, 29 U.S.C. § 793, in *Rogers*, conflicts with its holding with respect to Section 504 in the present case. However, the Fifth Circuit in *Rogers*, relying upon *Cannon*, expressly pointed out the distinct differences

between the two statutes and noted that a private right of action exists under Section 504. 611 F.2d at 1083. Indeed, the Fifth Circuit en banc saw no conflict between the two decisions when it refused to rehear the *Camenisch* case.

Petitioners also contend that the decisions in *Trageser* v. *Libbie Rehab. Ctr., Inc.*, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979), and *Carmi* v. *Metropolitan St. Louis Sewer Dist*, 620 F.2d 672 (8th Cir. 1980), *cert. filed*, No. 80-59 (July 14, 1980), warrant the granting of certiorari in the present case. Both of those cases, however, involved an issue which simply does not exist here—whether employment discrimination is included within the scope of activities covered by Section 504. In fact, the *Trageser* court noted the private litigant's right to bring a postsecondary education suit under Section 504. 590 F.2d at 90, n.12.

IV. THE ISSUE OF WHETHER SECTION 504 APPLIES ONLY TO THE SPECIFIC PROGRAMS THAT RECEIVE FEDERAL FINANCIAL ASSISTANCE WAS NEVER RAISED IN THE COURTS BELOW AND IS NOT PROPERLY BEFORE THIS COURT

Petitioners admitted in their Answer to the Verified Complaint that the University of Texas is a recipient of federal financial assistance. They later stipulated that the University receives in excess of $31,400,000 in federal funds and has signed an Assurance of Compliance Form, agreeing to comply with the HEW 504 Regulations.

Petitioners now ask this Court to resolve the issue of whether Section 504 applies only to the specific programs that receive federal aid. This issue was never raised, never pleaded as a defense, and never briefed or argued before the courts below. This Court has consistently refused to consider issues which have not been raised,

pleaded, or argued in either the district court or the court of appeals. *Miree* v. *Dekalb County*, 433 U.S. 25, 33-34 (1977); *United States* v. *Estate of Donnelly*, 397 U.S. 286, 295, n. 5 (1970).

CONCLUSION

The Petition for Writ of Certiorari should be denied for the reasons set out above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marc P. Charmatz, do hereby certify that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served upon Respondent by depositing same in the United States mail, certified, return receipt requested, to the following attorney of record for Petitioner: Lonny F. Zwiener, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711, on this the 25th day of September, 1980.

MARC P. CHARMATZ

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-2191

WALTER CAMENISCH,
Plaintiff-Appellee,
v.
THE UNIVERSITY OF TEXAS, *et al.*,
Defendants-Appellants.

From The United States District Court
For The Western District of Texas
Austin Division

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ARGUMENT AND AUTHORITIES

The Defendants contend that the District Court should have dismissed this cause of action as the Court lacks jurisdiction to hear it and/or to grant any preliminary relief until the Department of Health, Education and Welfare has had full opportunity to make the administrative judgments required by the Regulations promulgated by the Secretary of Health, Education and Welfare found at 45 C.F.R., Part 84 and 42 Federal Register, Wednesday, May 4, 1977, Part IV at pages 22676 through 22702. In view of the fact that the trial court based its order solely on statutory grounds, this brief will not deal with the constitutional issues which might be raised by Plaintiff's Fourteenth Amendment claims in the Court below; nor will the constitutional jurisdictional questions with respect to the Eleventh Amendment be discussed in this brief as this appeal relates only to the propriety of the preliminary injunctive relief granted by the Court below. Further, this brief will not address the question of whether or not the promulgated regulations would exceed the scope of the statute if they were to require colleges to provide interpreter services. Defendants contend that this would be the case, but do not believe that issue is presently before the Court in view of the fact that there has been no determination made by the Court below that such services are mandated by the regulations.

* * * *